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Collective Bargaining In The Federal Public Service of Canada — After Four Years — A Time To Reflect, Review and Reform

By C. GORDON SIMMONS*

One of the most pressing problems on the American labor scene is collective bargaining between the government, as employer, and public service employees. Professor Simmons in this article examines the unique approach that Canada has taken in this area and the resulting experiences and problems encountered by that system.

After four years of collective bargaining under the Federal Public Service Act of Canada the participants are clamoring for significant reforms which they claim must be implemented if the process is to retain the high degree of acceptance it was initially granted. Critics of late have been stating that too many restrictions are built into the process which is rapidly robbing it of any hope it may have in providing a viable mechanism to cope with the increasing complexities associated with employer-employee relations.

The enactment of the Public Service Staff Relations Act¹ in 1967 extended collective bargaining to approximately 210,000 employees in the Federal Public Service Act of Canada. The features of the Act resemble in many respects collective bargaining in the private sector. It also contains several unique features of its own. For a nation whose labor laws have largely followed patterns established by others, it is somewhat surprising that the measures which were adopted are not only unique in approach but quite liberal in application. The Act applies to all employees

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¹ The Public Service Staff Relations Act, CAN. REV. STAT. Vol. VI C.P. 35 (1970), [hereinafter the Act].

in the Public Service of Canada, either in the central administration or in one of the several agencies that have retained their autonomy and who are referred to in the Act as "separate employers."² While the Treasury Board represents the employer (Parliament) in the central administration, separate employers retain their own labor relations experts. One of the unique features included the establishment of a completely new and independent administrative tribunal to administer the Act. While the Minister of Labor is the person normally responsible for ensuring that labor relations laws are enforced, it was recognized very early in preparing for collective bargaining in the public service that it would be most difficult for the Minister to provide the degree of independence and impartiality required in a system in which the government was one of the parties involved.³ Unlike the private sector where the government participates as the impartial third party, with the Minister of Labor being the catalyst, the establishment of the Public Service Staff Relations Board (hereinafter called the Board) was the method selected to carry out this role.

The Board is assisted in its task by an arbitration tribunal⁴ which deals with interest disputes⁵ by conciliators⁶ who assist parties to reach settlements when they become deadlocked in their negotiations; and by adjudicators⁷ who deal with grievances involving rights disputes that are referred to adjudication. The

² They include the Atomic Energy Control Board; The Centennial Commission; The Defence Research Board; The Economic Council of Canada; The Medical Research Council; The National Film Board; The National Research Council of Canada; The Northern Canada Power Commission; The Public Service Staff Relations Board and the Science Council of Canada. See § 4 of the Act.

There are also 'Crown Corporations' which engage "Public employees" but they are excluded from the provisions of the Act. Crown Corporations are similar in structure to privately owned corporations but the share capital is wholly owned by the Government. Air Canada, The Canadian National Railway and The Canadian Broadcasting Corporation are examples of such corporations and their labor-management relations are regulated by the same laws which are applicable in the private sector. See The Canada Labour Code, CAN. REV. STAT. C. L-1 § 4(d) (1970).

³ *Report of the Preparatory Committee on Collective Bargaining in the Public Service*, Queen's Printer, Ottawa at 25-6 (1965).

⁴ The Act § 60.

⁵ The Act §§ 63-76. For a discussion of the distinction between contract or interest arbitration and dispute arbitration see Goldman, *A Proposed Arbitration Act for Kentucky*, 22 ARB. J. 193, 197. See also note, *The Peaceful Settlement of Disputes Over Contract Terms*, 58 NW. U. L. REV. 556, 558 (1964).

⁶ The Act §§ 52, 78.

⁷ The Act §§ 92, 93.

chairman of the arbitration tribunal is appointed by cabinet for a term of seven years upon the recommendation of the Board. Because of the heavy work load being experienced by the tribunal two alternate chairmen were recently appointed⁸ on a part-time basis.⁹ The tribunal is tripartite and the Board appoints its members on an *ad hoc* basis, but the selection is restricted to an available panel consisting of an equal number of employer-employee representatives. Conciliation services available to the parties are designed to assist them in reaching a collective agreement. There may be a single conciliator or a three man conciliation board and the chairman of the Board is empowered under the Act to make such appointments. There are no full-time conciliators as such, rather, persons experienced in labor-management relations are called upon when either party seeks the assistance of such services and the chairman of the Board determines that conciliation is necessary. The chief adjudicator is on permanent staff and is located at the Board's premises in Ottawa. He assigns grievances to the various part-time adjudicators as well as adjudicating many grievances himself. The part-time adjudicators are experienced arbitrators who adjudicate purely on an *ad hoc* basis.

With the passage of collective bargaining legislation in 1967 a pioneering atmosphere permeated throughout the public service. There was an awareness that many of the provisions in the new legislation were unique to the public service in Canada and elsewhere. No other nation had been so liberal in its approach to such a problem and students of labor-management relations awaited developments with keen anticipation and expectation. It is surprising that Bill C-170¹⁰ became law with very little criticism, either destructive or constructive. Plaudits did come from the labor organizations while on the other hand opponents envisaged a complete cessation of public services with resulting chaos. Such pessimism has not proved to be warranted but neither has the legislation proved to be the panacea that some of its proponents and authors believed it would be.

⁸ His Honor Judge Walter A. Little, a county court judge in the Province of Ontario and Dr. A. W. R. Carrothers, President of the University of Alberta. Both appointees are experienced labor arbitrators.

⁹ The Act § 60(5).

¹⁰ Bill C-170 received its first reading in the House of Commons on April 25, 1966 and its third reading February 20, 1967.

During the early stages of development the legislation proved to be equal to all that had been expected of it. It provided the necessary machinery to accommodate the immediate needs of the parties. The Board quickly assumed control under the experienced chairmanship of Mr. Jacob Finkelman Q.C.¹¹ Bargaining units were established, bargaining agents were certified and initial collective agreements were entered into with seemingly little effort. This orderly transition to the collective bargaining process is attributable to several factors. Both parties were aware they were on stage being watched by many interested observers. And, since the employer had been the creator of the process it was anxious to have it implemented without difficulties and as speedily as possible. The bargaining agents were still insecure in their new role and possessed an understandable desire to cement their position by concluding collective agreements as quickly as possible. Thus, both sides had a compelling urge to sign collective agreements.

Another factor that contributed to the orderly transition to collective bargaining is the nature of the civil servant, whose history has not displayed the same degree of militancy normally found in employees outside the public service. That is not to say the civil servant was oblivious to what was happening around him, nor can it be said he was totally complacent, but bargaining agents did not experience a great deal of pressure to secure concessions that could have caused difficulty in concluding those initial agreements. The attitude of the civil servant is further exemplified in the fact that 160,000 of the 198,000 employees who are represented by bargaining agents have opted for binding arbitration.¹² Of the 38,000 who have chosen the "strike" process, approximately 25,000 are postal employees.¹³ The 160,000 employees who have opted for binding arbitration are contained in

¹¹ Q.C. means Queen's Counsel. In Canada the Bar is divided into junior and senior members. To become a Q.C., a member of the Bar would normally have been in practice a minimum of ten years and there is no assurance that he will be appointed a Q.C. even at this time. The appointment is honorific which, while being prestigious, affords certain privileges such as being called to the Inner Bar. Mr. Finkelman had been Chairman of the Labor Relations Board for Ontario for many years before joining the Public Service Staff Relations Board.

¹² *The Third Annual Report of The Public Service Staff Relations Board* (the Board) (1969-70), Information Canada, Ottawa, at 22.

¹³ The first annual report of the Board 1967-68, Information Canada, Ottawa, at 36.

100 of the 114 bargaining units.¹⁴ This attitude is changing. There has especially been a growing disenchantment with the restrictive provisions contained in the legislation. Most of the restrictions emerged when the collective bargaining process became familiar to the participants. Nevertheless, the employee organizations were aware that the Bill contained undesirable provisions but they were not insistent upon their removal before the Bill became law. This is understandable because the passage of the Bill remained in the future and opponents¹⁵ to the entire scheme were a constant reminder of how fragile and insecure was their position. Thus, while there existed some undesirable provisions, the old cliché, a half a loaf is better than none, has some relevancy. The situation is now changed. The few years of experience has generated a feeling of confidence in the employee organizations and the shortcomings in the legislation have become more apparent. Added to this have been the rather conservative interpretations of various sections of the statute which, when taken altogether, have caused demands for change which are becoming increasingly stronger. Thus, while excitement and anticipation prevailed during the early stages in the development of collective bargaining in the public service, such no longer prevails. Indeed, because of the various criticisms which persist a committee has been established to review the experience of the entire process during its first four years.¹⁶ Interested bodies appearing before the committee have voiced their criticisms and have called for change.

While some aspects of the Act have caused concern and have been the subject of widespread criticism it must be remembered that many features of the Act have proved to work very satisfactorily and there will not likely be any changes made so far as they are concerned. Reform is needed in those provisions which are not apparently performing the functions for which they were designed. We shall look at some such provisions.

¹⁴ Report, *supra* note 12, at 22.

¹⁵ See, for example the debates carried on in the House of Commons, The House of Commons Debates, February 17, 1967, Volume III, No. 210, Queen's Printer, Ottawa 1967, at 13158-196.

¹⁶ *Advisory Committee to the Minister of Manpower and Immigration on the Public Service Staff Relations Act*, (1971), John G. Bryden, chairman.

I. CERTIFICATIONS

A bargaining agent, once certified under the Act, enjoys exclusive rights to represent all the employees within the bargaining unit that is deemed by the Board to be appropriate. Unlike similar legislation in the private sector there is no provision under the Act for voluntary recognition by the employer.¹⁷ It is not difficult to understand the absence of a voluntary recognition provision where the employer is the government. For the government to voluntarily recognize a bargaining agent in such circumstances could open the way for accusations of favoritism which it could ill afford.

Because of the requirement contained in the legislation that initial certifications encompass bargaining units on an occupational group basis,¹⁸ there is a potential problem that has not yet surfaced but one with which the Board will eventually have to deal. The root of the problem began prior to the introduction of collective bargaining. A great number of positions, classifications and job grades had existed in the public service.¹⁹ The Preparatory Committee on Collective Bargaining in the Public Service expressed the opinion that the organization of the public service would have to undergo comprehensive reorganization for an orderly system of collective bargaining to exist and recommended that it be reorganized into six broad categories encompassing sixty-seven different occupational groups.²⁰ The recommendation was accepted.²¹ The committee also recommended that bargaining units in the central administration be established on an occupational group basis during the initial certification period.²² This recommendation was likewise adopted into the legislation.²³ Thus, during the initial certification period the Board

¹⁷ However, the bargaining agent may be replaced by having his certification revoked by a rival union by loss of support of its members, fraud or by abandonment. See The Public Service Act §§ 41-3 (1970).

¹⁸ The Act § 26(4).

¹⁹ Preparatory Committee, *supra* note 3, at 9. Where it was stated "At the present time, there are over 138,000 continuing positions under the Civil Service Act. They are found in about 700 classes and 1,700 grades. Some of the classes cover only one occupation, others encompass several related occupations; still others cover a number of unrelated occupations.

²⁰ *Id.* at 10-14.

²¹ The Act § 26(1).

²² Preparatory Committee, *supra* note 3, at 31.

²³ The Act § 26(4).

was authorized to certify bargaining units comprising: (1) all employees in an occupational group, (2) all supervisory employees in an occupational group, or (3) all non-supervisory employees in an occupational group. Such an approach to collective bargaining had both immediate and future ramifications. The most immediate of such proposals were felt by the civil service associations. Largely because of the above recommended changes in the organization of the public service some of the then existing civil service associations merged to form the Public Service Alliance of Canada in 1966.²⁴

The Board had a certain amount of discretion in determining the appropriateness of bargaining units during initial certifications when objections to the proposed bargaining unit were filed.²⁵ However, with but one exception, the *Ships Pilots Case*,²⁶ the Board refused to make any exceptions. In that case the Board was persuaded to grant certification on other than an occupational group basis when it was satisfied that the interests of the employees were so diverse that no gainful purpose would be served by insisting that all belong to one bargaining unit. The employees involved were ships' pilots. They included one group of harbour pilots working out of Sydney, Nova Scotia and Goose Bay, Labrador on the East Coast and the second group who worked out of the Port Weller-Sarnia Great Lake area. The employment season for each group of pilots varied as well as the work which they performed. The terms and conditions of work and the basis for remuneration were likewise different and the Board could see no reason for them to be included in one bargaining unit.

While the Board deviated from its normal pattern when certifying ships' pilots, its decision in the second *Ship Repair Case*²⁷ is an example of the tenacity with which the Board refused to grant other applications for splintering units. This application involved a request to include all non-supervisory employees in a bargaining unit with only a portion of the supervisors. In denying

²⁴ The Associations realized that because each had members in all or most all of the proposed occupational groups (hence bargaining units), a struggle would ensue over bargaining rights if they were to remain separate associations.

²⁵ The Act § 26(5).

²⁶ The *Ships Pilots case*, Board File 143-2-123, October 6, 1969. Note: Information Canada, Ottawa has recently undertaken issuing Board reports but has not become current to date. The reports are available from the Board.

²⁷ Board File 146-2-9; 146-2-17, January 11, 1968.

the application the Board stated that while it could separate a supervisory from non-supervisory bargaining unit, it could not, under the subsection, separate all non-supervisory and some, but not all, of the supervisory employees.

By March 31, 1970, the end of the initial round of bargaining had occurred and with it the initial certification period had terminated. Of the total certifications representing 114 bargaining units, there were 108 collective agreements that had been entered into, each representing one bargaining unit. Seventy-three collective agreements had been entered into during the fiscal year April 1, 1969 to March 31, 1970 with thirty-five being concluded the previous fiscal year.²⁸ Now that the initial certification period has passed the Board is no longer restricted in determining appropriate bargaining units.²⁹ Just how long a period remains before the Board will be called upon to enunciate a policy on future certification applications for regional or more local bargaining units is uncertain but such applications will undoubtedly be made. As noted above, it was considered expedient to have all employees of each occupational group in one bargaining unit. This clearly assisted the orderly transition to collective bargaining. No serious objections were made at that time by employee organizations because they had members throughout the public service. But such a policy, if continued, will pre-empt any new organization from gaining certification and conversely will lock in isolated groups of employees who might otherwise believe that their interests could best be served by a more local bargaining agent. To cite an example, there are the air traffic controllers who are employed in fairly localized areas. Such areas include St. John's, Newfoundland, Halifax, Montreal, Toronto, Ottawa, Winnipeg, Vancouver, etc. Are the interests of employees working in St. John's sufficiently similar to those working in Vancouver to insist upon them remaining in the same bargaining unit? I do not think so. It is my belief that there will be eventually a number of applications requesting the Board to carve out new bargaining units from those presently existing. It is the function of the Board to determine appropriate bargaining units, but it will no doubt require strong arguments to convince the Board that the present

²⁸ Third Annual Report, *supra* note 12, at 46.

²⁹ The Act § 32.

approach is detrimental to overall collective bargaining before granting such applications.

II. EMPLOYEE DESIGNATIONS

One of the unique features of this legislation is the option that is granted to employees to select either binding arbitration or the right to strike. If employees select the strike procedure certain safeguards are built into the system whereby the services to the public may not be totally curtailed if there are employees in the bargaining unit whose duties are necessary to protect "the safety or security of the public."³⁰ The procedure is as follows: within twenty days after notice to bargain collectively is given by either party, the employer is to provide a list of employees or classes of employees whom it considers to be designated employees under Section 79 of the Act.³¹ The bargaining agent has fifteen days to file an objection³² and if agreement cannot be reached between the parties, the Board makes the decision.³³

On March 31, 1970, the latest date on which figures are available, there were 160,191 employees included in bargaining units known to the employer and twenty days had passed since notice to bargain collectively had been given. Of this total 21,866 employees or 13.6% had been designated under Section 79.³⁴ What these figures do not tell however is the fact that some bargaining units have 100% of their members designated³⁵ which effectively compels the bargaining agent to choose binding arbitration. There may also be situations where a high percentage of the employees in the bargaining unit has been designated and, while not necessarily being 100% of the total number of employees in the unit, any strike by those not designated would be considered a fruitless exercise.

While not mandatory, it is fairly important that a bargaining agent seek a preliminary list of designations before selecting which method of dispute settlement process it intends to follow.

³⁰ The Act § 79(1).

³¹ The Act § 79(2).

³² P.S.S.R.B. Regulations and Rules of Procedure, § 29A.

³³ The Act § 79(3)-(4).

³⁴ Third Annual Report, *supra* note 12, at 22.

³⁵ Brief presented by the Public Service Alliance of Canada to the Advisory Committee to the Minister of Manpower and Immigration, April 1971, vol. 1 of 2, at 92. The groups included correctional, fire-fighters and lightkeepers.

On at least one occasion the bargaining agent selected the right to "strike" without first having obtained such a list and subsequently found that all employees in the unit were designated. By agreement between the parties it was decided that if negotiations required a conciliation board, each would nominate a member of the appropriate panel of the Public Service Arbitration Tribunal and that the nominees would agree to have the chairman of the Tribunal act as chairman of the conciliation board and the award would be final and binding.³⁶

One of the major sources of complaint in designating employees is the interpretation placed upon the phrase "safety or security of the public". While it has been interpreted very broadly so as to include 100% of the employees in some bargaining units, there have been other units such as postal operations which have had no designations. In the *Electronics Case*³⁷ the Board attempted to establish broad guidelines concerning the problem associated with designating employees. The issue involved electronic technicians whose duties involved the maintenance of electronic equipment on coast guard vessels, weather ships, search and rescue vessels, and ice breakers. The Board established five basic principles:

1. Inconvenience only to the public in case of a shut down of services was not sufficient. To be designated, an employee would have to be performing services necessary to the safety or security of the public.
2. In the absence of actual experience the Board adopted the view that a conservative approach was justifiable where there was a probability, or even a possibility, that the safety or security of the public would be jeopardized. In such a case § 79 became operative.
3. The Board lacked authority to order the employer to instruct the employees in other bargaining units or non-organized employees to make limited use of the equipment serviced by the technicians.
4. The Board emphasized that its conclusions were not to be taken as setting out definitive statements for all time.
5. The Board determined that certain employees be desig-

³⁶ The Second Annual Report of the Public Service Staff Relations Board (1968-69), Information Canada, Ottawa at 28.

³⁷ Board File 181-2-8, September 5, 1969.

nated on a stand-by basis, which meant to be readily available for work on short notice to replace a designated employee who could not perform his work because of some illness.

In reaching its decision the Board acknowledged that it did not possess the research facilities to explore the issues in depth and concluded that if it was to err it should do so on the conservative side. One Board member, Mr. A. Andras, considered the approach of the Board to be so conservative that he wrote a stinging minority opinion wherein he criticized the Board for enunciating a policy which effectively resulted in a "business as usual" approach to the problem. The bargaining agents claim that employee designations are applied much too broadly which effectively eliminates any choice in selecting the method of dispute settlement in many situations leaving only binding arbitration available. Once binding arbitration becomes the only alternative the restrictions on negotiable items become greater because the arbitration tribunal is severely limited in the number of bargainable issues with which it may deal; and this in turn leads to additional grounds for complaint.

III. RESTRICTIONS UPON BARGAINABLE ISSUES

Whether the process chosen for dispute settlement is arbitration or strike, restrictions on the number of bargainable issues exist. For example, Section 56(2) of the Act states in part:

No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment. . . .

...

(b) that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III.

Specified in Schedule III is the Public Service Employment Act,³⁸ which accompanied the Public Service Staff Relations Act in its passage through Parliament in 1967 and which created the Public Service Commission. The functions of the commission

³⁸The Public Service Employment Act, CAN. REV. STAT. Vol. VII C.P. 32 (1970).

include supervising the merit system and staffing the public service. It is through the commission that the employer may cause employees to be laid off from work without regard to seniority;³⁹ as well as making transfers, promotions, demotions, releases, probations and appraisals without regard to the bargaining agent.⁴⁰ Superannuation is also excluded from the bargaining table.⁴¹ Clearly, the above terms and conditions of employment are traditionally regarded as negotiable issues in the private sector. Therefore, whether the dispute settlement process chosen is arbitration or strike, bargaining agents claim that serious restrictions exist over the issues that are negotiable and which must be altered. More is said on this subject below.

IV. BINDING ARBITRATION

Bargaining agents claim that restrictions on traditional bargainable issues are more severe for those who select binding arbitration. Section 70 of the Act states the bounds within which an arbitration tribunal must confine itself. It reads:

(1) Subject to this section, an arbitral award may deal with rates of pay, hours of work, leave entitlements, standards of discipline and other terms and conditions of employment directly related thereto.

(2) Subsection 56(2) applies, *mutatis mutandis*, in relation to an arbitral award.

(3) No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.

(4) An arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made.

Recently, the Public Service Alliance has stated that the arbitration process is completely unacceptable in its present form.⁴²

³⁹ The Act § 29.

⁴⁰ *Id.* §§ 70(3), 86(3).

⁴¹ *Id.* § 56(2).

⁴² Brief presented to the Advisory Committee, *supra* note 35, at 93.

In its argument the Alliance focuses attention on the inability of the arbitration tribunal to render decisions on any matter that was not a subject of negotiation between the parties during the period before arbitration was requested. As a result, the bargaining agent may find itself in an extremely awkward position. For example, the employees in the bargaining unit are asked by the bargaining agent to indicate their choice of dispute settlement through means of a vote. Before the vote is taken the bargaining agent learns that a large proportion of the employees in the unit have been designated so as to render any threat of a strike ineffective in gaining meaningful concessions. The opinion of the bargaining agent is conveyed to the membership and arbitration is chosen. Once having made such a choice, however, the bargaining agent's attempt to resolve any issues which it considers to be especially important may be completely thwarted if the employer refuses to negotiate them. Indeed, the President of the Alliance has recently stated that the employer has deliberately refused to bargain over some issues because the employees in the bargaining unit have selected arbitration.⁴³

Designations of employees is not the only reason employees opt for binding arbitration. The unit may select arbitration because its size, composition and nature of the work performed would not likely have a significant impact if the employees went on strike. For instance, it may be doubtful whether employees of the Dominion Coal Board or the National Library would fare better if they chose the strike route instead of binding arbitration, notwithstanding the greater restrictions imposed upon the latter process. It is in bargaining units such as these where the arbitration process presents a viable alternative to strikes. Indeed, the bargaining agents are not saying that arbitration should be eliminated. Rather, they are calling for a broadening of the authority of the tribunal. Therefore, merit exists for both processes. Nevertheless, a changing pattern in the desires of the employees appears to be emerging. Evidence of this changing pattern became evident in September 1970 when approximately 50,000 employees were requested to indicate their choice between arbitration or conciliation with the right to strike. When the

⁴³ The Labour Gazette, Canada Department of Labour, Vol. 71, No. 8, August 1971, at 533.

results of the votes were compared to those in 1967 it was learned that the number favoring arbitration had declined somewhat but arbitration still remained the overwhelming choice.⁴⁴

Unit	% Employees favoring Arbitration 1967	% Employees favoring Arbitration Sept. '70	% Change
Communicators (614 employee unit)	60%	47.0%	-13.0%
Clerks	63%	59.3%	- 3.7%
Administrative Foreign Service	80%	77.6%	- 2.4%
Financial Administrators	90%	79.4%	-10.6%

In 1971 the swing away from arbitration has been much greater as the following table illustrates:⁴⁵

ALTERATIONS IN DISPUTE PROCESS SPECIFICATION

Unit	*No. of employees in unit	**No. of employees proposed and/ or designated	Parties	***Alteration	Date
Education (list)	2150	P(60) D(A 60)	PSAC/TB	A to C	3/3/71
S & P Category All employees except Defence Scientific Research Officers	9	—	PIPS/DRB	C to A	28/4/71
Heating, Power & Stationary Plant Operation—S (list + O)	593	P(2029) D(—)— +	PSAC/TB	A to C	22/7/71
n —NS	2334		PSAC/TB	A to C	22/7/71
Firefighters—S (list + O)	239	P(1271) D(—)— +	PSAC/TB	A to C	22/7/71
n —NS	1196		PSAC/TB	A to C	22/7/71
Operational Category (list + O)	629	P(81) D(—)— +	PSAC/DRB	A to C	22/7/71
General Labor & Trades—S	1853	P(2457) D(—)— +	PSAC/TB	A to C	26/8/71
General Labor & Trades—NS	19856		PSAC/TB	A to C	26/8/71

* Number of employees reflects number at time of certification.

** P = proposed; D = Designated; A = by agreement.

*** C to A = Conciliation (and strike to arbitration.)

A to C = Arbitration to conciliation (and strike). Employees of each unit are allowed to elect which method of settlement will be used.

+ Not determined to date.

⁴⁴ The Toronto Globe and Mail, Sept. 16, 1970, at 29, col. 66.

⁴⁵ Supplied by the Registrar of the P.S.S.R.B.

While arbitration continues to remain the most favored process to resolve disputes the arguments advanced for change deserve serious considerations. If restrictions continue on the authority of the arbitration tribunal, the employees may eventually discard that process entirely.

V. STRIKES AND LOCKOUTS

Employees in bargaining units who have opted for binding arbitration are expressly prohibited by the Act from resorting to strike⁴⁶ to settle their disputes with the employer; as are the employees in bargaining units who have opted for the strike procedure but who are designated employees.⁴⁷ For the remaining employees in bargaining units who have opted for the strike procedure there exists a real possibility that a strike will eventually take place. There have been two legal strikes to date, both involving the postal employees. The first of such strikes commenced on July 18, 1968 and continued for eighteen days until August 8. The reaction of the public was mild during the beginning stages of the strike. This was due to at least two major factors. The first was attributable to an illegal strike of the postal employees in July 1965 which had lasted seventeen days. Having thus endured the experience of no mail services in 1965, businesses and other institutions were better prepared for cessation of services in 1968. Because of this past experience they had arranged alternate methods of communication as threats of an impending strike became more frequent at the negotiation table. The second factor was due to a great deal of sympathy generated by the public for the plight of the postal workers. This feeling was fostered by the press who had been critical of the employer for withholding concessions to demands that appeared to be reasonable.

As the strike continued, however, sympathy was replaced by frustration and impatience. Pressure began to mount for the government to take strong measures by legislating an end to the strike. However, the government was extremely reluctant to intervene during this first real test of the new collective bargaining process. Fortunately the strike was settled with the assistance of a mediator before the government was compelled to intervene.

⁴⁶ The Act § 101(b).

⁴⁷ The Act § 101(c).

During the next round of negotiations involving the Council of Postal Unions and the Treasury Board in 1970, the parties were once again unable to resolve their differences. This time, however, their strategy was changed. The employees had arrived at a position when they could lawfully strike,⁴⁸ but the Council of Postal Unions made no declaration⁴⁹ that a strike was to take place. Instead, a series of rotating work stoppages commenced on May 13, 1970. By prearrangement, bargaining unit employees at one or several post offices in selected areas would fail to report for work at the commencement of their regularly scheduled shift. They would then remain absent from work for periods of either twenty-four or forty-eight hours at which time they would report for work and employees in other post offices would commence a work stoppage in the same manner and so it continued. To remain away from work for more than forty-eight hours without participating in a declared strike or without other lawful excuse could imperil their positions as employees.⁵⁰ The strategy and direction of the work stoppages was controlled by the union executives who were negotiating with Treasury Board in Ottawa.

This pattern of work stoppages continued until an unexpected turn of events occurred on July 8 when employees at the main post office in Montreal and at four dependent post offices in the Montreal area did not report for work at the commencement of their regularly scheduled 6:00 a.m. shift. Many post offices are dependent upon the Montreal post office for their supplies because the sorting area for a significant portion of the Province of Quebec is Montreal. By 8:00 a.m. employees in Quebec City and thirty-nine post offices dependent upon the Quebec City post office were informed that those post offices were immediately suspending operations. Postal officials claimed Quebec City was dependent upon the Montreal office and with the Montreal post office closed there was no work available. This was in substance a lockout by the post office. Thus, the post office had apparently devised a scheme to counteract the union tactics and with the disruption of postal services becoming much more widespread hoped to focus public pressure on the postal unions to strive for

⁴⁸ The Act § 101(2).

⁴⁹ The Act § 102.

⁵⁰ S.C. 1966-67, 14-15-16 Elizabeth II, c. 77.

a settlement. This same situation developed at a number of other centers from time to time. The problem came before the Board in a complaint⁵¹ lodged by the Council of Postal Unions alleging that the employer had caused a lockout which is not expressly permitted by the Act. The Board dismissed the application, ostensibly because the postal authorities were able to satisfactorily demonstrate that the reason they undertook their actions was to "maintain the optimum level of service possible in the circumstances." The Board continued:

We are not concerned to judge whether the postal authorities did or did not have reasonable grounds for believing that their purpose would be achieved by the action they took, or that the course adopted was one that would further the desired objective in the highest degree or in a uniform fashion throughout the postal service so long as we are satisfied that it was their real purpose.

While the Board did not feel compelled to expressly state that lockouts are prohibited *per se*, the President of the Treasury Board appeared to have no doubts about the matter when he stated publicly that the whole philosophy of prohibited lockouts in the legislation ought to be reconsidered.⁵²

During the course of the 1970 strike a potentially acute problem became evident. The federal cabinet is composed of ministers chosen from the political party having a majority of members in the House of Commons. Each of these ministers usually heads a government department. One such cabinet minister was the Honorable C. M. Drury, Treasury Board President, whose department was responsible, *inter alia*, for carrying out negotiations with the Council of Postal Unions. It was essential that settlements reached between the employer and employees who had opted for the strike not be out of line with settlements obtained in the arbitration process, if the two processes were to continue to exist side by side in a balanced program. It was therefore necessary for the Treasury Board to retain an overview of the entire public service with a proper balancing of interests.

⁵¹ Council of Postal Unions v. Her Majesty in the Right of Canada as represented by the Treasury Board, Board file 161-2-85, August 27, 1970.

⁵² The Toronto Globe & Mail, *supra* note 44.

On the other hand, another cabinet minister, the Honorable E. Kierans, Postmaster General, had more immediate problems. He warned that the loss of business in the postal service would take a long time to recover its pre-strike position, and that perhaps would never recover because of the efficient alternate modes of communication that various business and other institutions were turning to during the period of interrupted services and would continue to retain when postal services were resumed. While Mr. Kierans was voicing this concern and criticizing the postal workers he could do nothing to rectify the situation because he was not involved in the negotiations. Similar situations will undoubtedly arise in the future. Whether or not the cabinet will retain an outward appearance of unanimity remains to be seen. If such is not possible, one wonders what effect a breakdown in the cabinet will have upon the collective bargaining process.

From the experience gained in two legal strikes involving postal workers several factors emerge. One, the public is prepared to undergo a fairly high degree of inconvenience in order to allow government employees to exert their lawful right to strike against their employer. This tolerance of the public may be tempered somewhat if the interruption of services occurs with regular frequency. It would appear the postal workers recognized this possibility during the second conflict when a method of rotating strikes was implemented which avoided a complete cessation of services. Another factor is the apparent limitation upon the employer against locking out its employees. While the idea of such a possibility may have been unthinkable prior to the strikes, experience raises some doubts about the efficacy of such an omission and there may indeed be situations where the right to lock out employees is an important weapon in the employer's arsenal. An additional factor is the potential divisiveness that may explode within the government hierarchy which may seriously impair the effectiveness of the present system. While there must be one spokesman for the employer, there nevertheless exists the need to consider all aspects of the immediate problem and surely no one is more conversant with the problems than the minister and his staff in charge of the particular department involved.

VI. LIMITATIONS UPON THE POWERS OF THE PUBLIC SERVICE BOARD

A. *Implementation of Collective Agreements*

When the parties reach a settlement in their negotiations another limitation upon the collective bargaining process becomes apparent. This limitation is on the powers of the Board. Section 56 of the Act reads in part:

(1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer therefor, be implemented by the parties,

...

(a) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and (b) where no period for implementation is so specified

- (i) within a period of ninety days from the date of its execution, or
- (ii) within such longer period as may, on application by either party to the agreement, appear reasonable to the Board.

On occasion the employer has failed to implement a collective agreement within the required time limits. When a complaint⁵³ was made over such delinquency the Board stated:

Having regard to the foregoing considerations, it is our view that the Board is authorized to afford to a complainant, if a proper case therefore is made out, relief against non-compliance by the employer with the provisions of section 56(1) (b) (ii) of the Act. That leaves the question—what type or form of relief? There are two remedies that might be considered as being appropriate: (i) a declaratory decision; (ii) a compliance order of some sort. We believe that the second of these alternatives is not available here. There is little practical value in issuing a compliance order unless there is some sanction that can be invoked if the order is disobeyed or ignored.

...

⁵³ The Public Service Alliance of Canada v. Her Majesty in the Right of Canada as represented by the Treasury Board;—*re* Radio Operations Group, Board files 161-2-50, 161-2-59, 161-2-60; December 1, 1969.

Compliance orders are expressly provided for under section 20 of the Act for the types of complaints enumerated in that section and the Act then goes on in section 21 to provide a sanction for non-compliance with those orders in the form of a report to the Minister through whom the Board reports to Parliament and the Minister is required to lay the report before Parliament within a fixed period of time. No such sanction is envisaged for any action the Board might think it should take in regard to non-compliance with section 56. The only sanction, if sanction it can be called, that might be invoked in such an event would be for the Board to include a statement concerning the non-compliance in its next annual report to Parliament, a course that would prove of little practical value to a successful complainant at a point of time where the "sanction" might have any material significance for him.

...

In light of what has been said above, we can do no more in these matters than express the fervent hope that the Employer will proceed to implement the collective agreement with the utmost expedition.

Following this decision another complaint based on the same section was filed with the Board.⁵⁴ On this occasion damages instead of implementation of the award was the remedy sought. The complainant argued at length that boards of arbitration, which decide rights disputes in the private sector, award damages for breaches of collective agreements, and that their authority to do so is implied rather than expressed. Furthermore, it was argued that such implied authority has been upheld by the Supreme Court of Canada.⁵⁵ However, the Board refused to grant this remedy as well. It was of the opinion that it had no power to assess damages for failure of the employer to comply with Section 56. The Board would go no further than to say:

We therefore declare that the employer is in default in that it has failed to comply with Section 56(1) (b) (i) of the Act in respect of the argument relating to quite a number of

⁵⁴ *The Public Service Alliance of Canada v. Her Majesty in the Right of Canada as represented by the Treasury Board;—re The Engineering and Scientific Support Group*, Board file 161-2-24; January 21, 1970.

⁵⁵ *Re Polmer Corporation & Oil Chemical & Atomic Workers International Union*, Local 16-14 (1962), 33 D.L.R.(2d) 124.

employees in the engineering and scientific support bargaining unit. In the light of what we have said above, we can do no more in this matter than express the hope that the employer will proceed to implement with the utmost expedition the collective agreement in those instances in which pay action on behalf of employees in the bargaining unit here concerned has not yet been completed at this date.

This inability on the part of the Board to order that proper corrective measures be taken immediately is becoming a fairly serious issue. During the fiscal year April 1st, 1969 to March 31st, 1970 there was a total of 65 complaints handled by the Board. Forty-eight of the complaints alleged that the employer had failed to implement the terms of a collective agreement within the time limit fixed by Section 56 of the Act.⁵⁶

B. Alterations in Terms and Conditions of Work

Closely related to the problem of implementation of collective agreements is one of altering the terms and conditions of work after notice to bargain has been given. A total of nine⁵⁷ of the above sixty-five complaints alleged that the employer had altered terms and conditions of employment after notice to bargain had been given by the bargaining agent, contrary to Section 51 of the Act.⁵⁸

⁵⁶ Third Annual Report, *supra* note 12, at 28.

⁵⁷ *Id.*

⁵⁸ Section 51 reads:

Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent, until such time as

(a) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration,

(i) a collective agreement has been entered into by the parties and no request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in the manner and within the time prescribed therefor by this Act, or

(ii) a request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in accordance with this Act and a collective agreement has been entered into or an arbitral award has been rendered in respect thereof; and

(b) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to a conciliation board,

(Continued on next page)

In the *Defence Research Board case*⁵⁹ the employees had enjoyed subsidized transportation costing them \$6.30 per month. After notice to bargain had been given the employer gave notice that the monthly contribution would be increased to \$8.65. The Board found that employer-employee contributions toward the transportation costs were not fixed amounts, but a sum that would fluctuate from time to time by a fixed formula, and dismissed the complaint. Before doing so, however the Board indicated that its powers to deal with alleged violations under Section 51 were limited. After reviewing other Canadian labor statutes it concluded:

they all prohibit the changing of working conditions in express terms and either declare that such a change is an unfair practice or make it an offence to introduce a change. Section 51 of the . . . Act departs from this pattern in that it does not make it an offence to alter terms and conditions of employment but rather treats any such alteration as a nullity.⁶⁰

The employer argued that a remedy, if any, lies in the courts and not in the Board. In reply to such argument the Board stated that:

. . . the whole scheme of the Public Service Staff Relations Act contemplates that the administration of the Act should rest primarily in the hands of the several tribunals that were established and that operate under the umbrella of the act . . . Since the problem with which we are here concerned cannot be brought either before the Arbitration Tribunal or before an adjudicator, it was in the contemplation of the authors of the legislation that it should be dealt with under the Act by the . . . Board.⁶¹

The Board also stated⁶² that the appropriate remedy for violating Section 51 "would appear to be a declaration that the original

(Footnote continued from preceding page)

(i) a collective agreement has been entered into by the parties,
(ii) a conciliation board has been established in accordance with this Act and seven days have elapsed from the receipt by the Chairman of the report of the conciliation board, or
(iii) a request for the establishment of a conciliation board has been made in accordance with this Act and the Chairman has notified the parties pursuant to section 78 of his intention not to establish such a board.

⁵⁹ Board file 161-2-10, April 29, 1969.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 7, 8.

⁶² *Id.* at 7.

conditions continue to apply notwithstanding their purported alteration by the employer". This decision was satisfactory to the complainant under the circumstances surrounding the instant case. By such a decision no harm could befall the employees for refusing to pay the additional transportation costs. But, can the same be said in situations where the employer acts unilaterally to the detriment of the employees in which they have no control over the situation? For example, imagine what would result if the employer unilaterally decided to discontinue deducting union dues and remitting them to the bargaining agent. If the Board made a declaration that such alteration was a nullity it would be a hollow victory indeed to the bargaining agent and employees involved.

Therefore, whether the issue involves implementation of a collective agreement or the alteration of an existing term or condition of work, the bargaining agent will not be successful in seeking redress through the Board. Of course, if the Board issued a declaration and the employer chose to ignore it, the Board could include the matter in its annual report to the Minister which would then be placed before Parliament.⁶³ But such a procedure involves interminable delays and no one would seriously suggest that such a route offers a satisfactory remedy.

VII. GRIEVANCES AND ADJUDICATIONS

Finally, there is the matter of processing and referring grievances to adjudication.⁶⁴ Features contained in this part of the Act are unique in many respects but once again subject to considerable criticism. It is important to note that any employee may pursue a grievance through the grievance procedure and it is immaterial if he is a member of a bargaining agent or in a certified bargaining unit. Such a feature of the Act is most worthwhile. It provides an available avenue for speedy resolution of employee problems. Not all grievances are referable to adjudication however, and herein lies the problem. In fact a great number of grievances fall outside the jurisdiction of the adjudicators. These grievances are decided instead at the senior administrative level within the de-

⁶³ The Act § 115.

⁶⁴ The Act §§ 90-99.

partment; which is usually the deputy minister. Thus grievances and adjudication are two distinct processes. While section 90 is framed in very broad terms, it permits an aggrieved employee to process almost any grievance, section 91 allows the grievance to be referred to adjudication only in respect to "the interpretation or application in respect of [the grievor] of a provision of a collective agreement or arbitral award, or disciplinary action resulting in discharge, suspension or a financial penalty." An important feature of the Act is that the grievance of an employee is the property of the grievor. It is he and not the bargaining agent who can process the grievance and, if adjudicable, refer the matter to adjudication. There is, however, one caveat to the preceding statement in that any reference to adjudication involving an interpretation or application of a collective agreement or arbitral award must have the approval of the bargaining agent.

Under certain circumstances the bargaining agent or employer may refer a matter to the chief adjudicator under section 98.⁶⁵ Such circumstance is limited to situations where the employer and bargaining agent have executed a collective agreement or are bound by an arbitral award and either party wishes to seek the enforcement of an alleged obligation contained therein. Then, if the alleged obligation is not one that could be the subject of enforcement through a grievance brought by an employee either party may refer the matter to the chief adjudicator. Whether the grievance is to be processed under either section 91 or section 98 can be confusing. For example, when the employer transformed a parking lot into one of reserved spaces only an employee claimed the change to be a violation of the collective agreement.

⁶⁵ Section 98 reads:

Sec. 98—(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and
(a) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and

(b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the chief adjudicator who shall personally hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.

(2) The chief adjudicator shall hear and determine the matter so referred to him as though it were a grievance, and subsection 95(2) and sections 96 and 97 apply to its hearing and determination.

While grieving the issue⁶⁶ with the approval of the bargaining agent (thereby invoking section 91) the adjudicator nevertheless dismissed the claim. He ruled that the grievance was a "group grievance" and one which could not properly be referred to adjudication under section 91. The adjudicator alluded to the possibility of processing the grievance under section 98. He stated:

Even if I agreed fully with the . . . submissions of the grievor I cannot see how they assist the grievor in showing that the grievance concerns the interpretation of the Agreement in respect of him, personally.

It would appear then, that grievances analogous to "group grievances" in the private sector must be referred by the bargaining agent to the chief adjudicator for determination under section 98.

However, in another decision⁶⁷ involving an issue processed under section 98 and determined by the chief adjudicator, a grievance was dismissed when it became apparent that the bargaining agent was pursuing a group grievance. The bargaining agent alleged that the employer had failed to adjust allowances upward in the Foreign Service. The chief adjudicator recognized that it would be most inconvenient to compel employees serving abroad to formulate their own grievances but said:

It was not impossible, factually or legally, for an individual employee to present a grievance arising out of the Employer's refusal to adjust [the allowances].

. . .

Section 98 contemplates what are commonly known in the private sector as 'policy grievances', and thus provides for their initiation by either an employer or a bargaining agent seeking to enforce an obligation.

Before dismissing the grievance however he expressed the opinion that the position adopted by the bargaining agent was the correct one and that the employer was at fault in not implementing the

⁶⁶ The Tulk case; Tulk and Treasury Board, Department of Fisheries and Forestry, R. D. Abbott, Adjudicator; Adjudication file 166-2-404, March 18, 1971.

⁶⁷ The Professional Association of Foreign Service Officers and Treasury Board, E. B. Jolliffe, Chief Adjudicator, Adjudication file 169-2-7, December 14, 1970.

adjustments; but this opinion was not binding upon the employer.

The above decisions, issued within three months of each other, immediately conjure visions of the era prior to the enactment of the Judicature Acts when litigants were compelled to select their courts with utmost care. The impact of the above decisions upon bargaining agents and employees alike can only be frustration. While it is recognized that a significant number of limitations already exist on matters which may be referred to adjudication, one can only question the efficacy of a system which compounds such limitations through procedural hurdles. Indeed, the result can only be a growing disenchantment with the system.

The second category of grievances involves "disciplinary action resulting in discharge, suspension or a financial penalty".⁶⁸ A number of situations that at first glance may appear to come within this category are really situations not involving disciplinary actions or financial penalties at all and are thereby not adjudicable. For example, terminations may not be disciplinary but may be lay-offs due to lack of work;⁶⁹ or rejections of probationary employees⁷⁰ or terminations because of incompetence and incapacity.⁷¹ In each of these situations the employment contract between employer and employee is permitted to be severed and cannot be a part of the adjudication process because they come within the ambit of the Public Service Employment Act and not the Public Service Staff Relations Act. Of course, a termination may in fact be disciplinary under the guise of lack of work, etc. and in such cases adjudicators look to the substance of the matter and not mere form.⁷²

A written reprimand not involving a financial penalty had been held not to be "disciplinary action" within the meaning of the section.⁷³ The Alliance has stated that: "the most objectionable question with regard to grievance/adjudication machinery in the P.S.S.R.A. is the limited scope of adjudication."⁷⁴ Of the 101

⁶⁸ The Act § 91(1)(b).

⁶⁹ The Act § 29.

⁷⁰ *Id.* at 28.

⁷¹ *Id.* at 31.

⁷² Caron and the National Capital Commission, H. W. Arthurs, Chief Adjudicator; Adjudication file 166-2-1, August 9, 1967. The decision was upheld upon appeal to the Board; Board file 168-2-2, January 26, 1968.

⁷³ Turner and Treasury Board (Dept. of National Revenue), H. W. Arthurs, Chief Adjudicator, Adjudication file 166-2-25, January 30, 1968.

⁷⁴ Brief presented to the Advisory Committee, *supra* note 35, at 111.

decisions rendered by adjudicators relating to "discharge, suspension or financial penalty" during the initial two year period ending March 31, 1969, 39 were dismissed because they were held to be beyond the jurisdiction of adjudicators.⁷⁵

From the foregoing discussion on grievances and adjudications one would probably agree that grounds for reform exist in this area. There is a growing number of complaints with this part of the process. Whether or not the complaints are justifiable, the bargaining agent has been given exclusive bargaining rights to represent employees in an appropriate bargaining unit and it seems logical that such rights should include grieving on its own an alleged violation of the collective agreement to which it is one of the co-authors and signatories. The need for extending such rights to the bargaining agent in disciplinary matters resulting in discharge, suspension or a financial penalty may not be as necessary as in matters involving the interpretation of the agreement. I suggest a similar need does exist especially when the employee is reluctant to pursue the matter for personal reasons. The bargaining agent should not have to rely upon a willing employee to initiate and pursue redress. Rather, the bargaining agent should be in a position to process the grievance itself if the employee is reluctant to do so, but who does not otherwise object.

CONCLUSION

Collective bargaining was introduced to the public service through the efforts of politicians in government who were familiar with the characteristics of public servants and who were convinced that collective bargaining would enhance the quality of the service. The provisions contained in the legislation have enabled a rational and orderly development of collective bargaining to evolve to the extent that it has reached a level of

⁷⁵ See, the First Annual Report, *supra* note 13, at 42; The Second Annual Report, *supra* note 36, at 44, and 46. While the Board deviated from the practice it followed in compiling its information in the first two annual reports, it is interesting to note the following comments at page 40 in its Third Annual Report, *supra* note 12:

During the year under review, 45 references alleged disciplinary action resulting in discharge, suspension or financial penalty, as compared with 46 in 1968-69 and 38 in 1967-68. Most of such cases resulted from suspension. Therefore while the number of cases is remaining fairly constant, the basis for the vast majority of grievances in 1969-70 is due to alleged improper suspensions.

sophistication hardly thought possible only four short years ago. The process has been tested in the extreme on two occasions and has survived. The shortcomings in the process discussed in this article are not exhaustive but probably represent the criticisms causing the most concern on a continuing basis. Concern has not been restricted to the immediate participants. The government, as an independent body, has also played its part by establishing a committee to review the legislation which is expected to recommend various reforms. Hopefully, such a review at this time will lead to the correction of the major deficiencies in the Public Service Staff Relations Act.